



U.S. Citizenship
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Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: JUN 07 2006

EAC 02 282 51847

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The director's decision will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that that the director erred by denying the petition without issuing a request for evidence in accordance with the regulation at 8 C.F.R. § 103.2(b)(8).¹

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3):

Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been

¹ Citizenship and Immigration Services (CIS) has recently reemphasized the requirements set forth in the regulation at 8 C.F.R. § 103.2(b)(8) in a policy memorandum. See policy memorandum by William Yates, Associate Director of Operations William Yates, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2, (February 16, 2005).

recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petition was filed on September 10, 2002. The evidence accompanying the petition failed to demonstrate that the petitioner meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability. Without issuing a request for evidence, the director denied the petition on October 28, 2004.

The director's decision cited the deficiencies in the record as they relate to the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director's decision concluded by stating that the evidence of record did "not persuasively establish that the [petitioner] qualifies as an alien of extraordinary ability."

In such an instance, where the evidence initially presented does not fully establish eligibility, a request for evidence or a notice of intent to deny is appropriate. The regulation at 8 C.F.R. § 103.2(b)(8) provides, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence.

Counsel also challenges the director's statement that "[m]erely meeting three of the ten categories of evidence suggested by the regulation does not automatically establish . . . eligibility for the classification of 'Alien of Extraordinary Ability.'" While we may not agree with the exact wording of the director's statement, we do not read the director's decision as concluding that the petitioner was eligible under the regulations but that the petition was not approvable. It is important to note that the controlling purpose of the regulation at 8 C.F.R. § 204.5(h)(3) is to establish sustained national or international acclaim, and any evidence submitted to meet the regulatory criteria must therefore be to some extent indicative of such acclaim. A more rational interpretation of the director's decision is that the petitioner submitted documentation which related to or addressed three criteria, but that the evidence itself did not demonstrate national or international acclaim. A petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria. In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it establishes that the petitioner has sustained national or international acclaim; it is not simply a matter of accepting that any piece of evidence presented under a particular criterion automatically satisfies that criterion. By way of analogy, CIS sometimes requires copies of income tax returns to establish that the petitioner has the ability to pay the proffered wage to the beneficiary. The petitioner, however, does not automatically meet this requirement by submitting a copy of an income tax return. Rather, we must consider the content of that income tax return; if it does not show that the petitioner can afford to pay the beneficiary, then the petitioner cannot credibly argue that it met its obligation merely by supplying the copy of the tax return. The same reasoning applies to evidence presented under the criteria 8 C.F.R. § 204.5(h)(3).

The petitioner's appellate submission includes a significant amount of the evidence that came into existence subsequent to the petition's filing date (i.e. – the two articles published in the May 28, 2004 issue of *Science*). A petitioner, however, must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(12); see *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Subsequent developments in the petitioner's career cannot retroactively establish that he was already eligible for the classification sought as of the filing date.

In this case, while we agree with the director that the initial evidence accompanying the petition was not adequate to demonstrate the petitioner's eligibility for the benefit sought, the director should have issued a request for evidence in accordance with the regulation at 8 C.F.R. § 103.2(b)(8). Therefore, this matter is remanded to the director for the purpose of issuing a RFE, informing the petitioner of the deficiencies in the record as they relate to the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director may request any additional evidence deemed warranted and should allow the petitioner 12 weeks to respond. Pursuant to *Matter of Katigbak, supra*, any evidence submitted in response to the director's request must demonstrate eligibility at the time of filing

(September 10, 2002). As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.